IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Indivídually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; EDWARD KALBERER, Individually and as Executive Director of the Allegheny County Board of Assistance; and THE DEPARTMENT OF PUBLIC WELFARE, OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

ANN DOE; BETTY DOE, a Minor, by Her Mother as Representative, Mother B. Doe; CATHY DOE; DONNA DOE; a Minor, by her Mother as Representative Mother D. Doe; ELAINE DOE; JANE DOE, a Minor, by Her Father as Representative, Father J. Doe; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether this Court should review on writ of certiorari a ruling of the Court of Appeals for the Third Circuit that declared invalid regulations of the Pennsylvania Department of Public Welfare which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies.

STATEMENT OF THE CASE

This action was instituted on October 3, 1973 in the Federal District Court for the Western District of Pennsylvania at 73-846 by eleven indigent pregnant women who are eligible for benefits under the Pennsylvania Medical Assistance Program. These women had been denied abortions by a Pittsburgh hospital because they had not met the requirements of the Pennsylvania Department of Public Welfare for obtaining Medical Assistance reimbursement for abortions (hereafter referred to as "DPW Abortion Procedures").* They requested the District Court to declare these DPW Abortion Procedures invalid on constitutional and statutory grounds and to enjoin defendants (the Pennsylvania Department of Public Welfare and certain of its officers and/or administrative representatives) from denying Medical Assistance reimbursement for first and second trimester abortions provided to Medical Assistance recipients by licensed physicians.

On May 3, 1974 a three-judge District Court, with one dissenting opinion, ruled that the DPW Abortion Procedures were unconstitutional as applied to abortions performed by a licensed physician within the first twelve weeks of pregnancy. The Court, however, granted no relief as to second trimester abortions.

Plaintiffs appealed to the Court of Appeals for the Third Circuit from the portions of the District Court Opinion, Order and Supplemental Order which denied their requests for

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* The DPW Abortion procedures provide for Medical Assistance reimbursement for abortions only in the following situations: (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother; (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; (3) There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

declaratory relief for second trimester abortions and defendants appealed to the same Court from the portions of the District Court Opinion, Order and Supplemental Order which declared the DPW Abortion Procedures unconstitutional as applied to abortions performed during the first twelve weeks of pregnancy. After argument before a panel of three Circuit Court Judges, the Court of Appeals for the Third Circuit at Nos. 74-1726/74-1727 directed the District Court to enter an order enjoining enforcement of the DPW Abortion Procedures for reasons not related to the validity of these Procedures.

Pursuant to petitions for rehearing filed by both parties, the case was reargued before the Court of Appeals en banc. On July 21, 1975 the Court of Appeals en banc (with three judges dissenting) decreed that the DPW Abortion Procedures, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, et seq. And having found the DPW Abortion Procedures to be invalid on statutory grounds, the Court did not consider plaintiffs' constitutional claim.

It is from this decision that defendants seek a writ of certiorari.

ARGUMENT

This Court should decline to review the ruling of the Court of Appeals for the Third Circuit that declared invalid regulations of the Pennsylvania Department of Public Welfare which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies.

I.

The Pennsylvania Department of Welfare regulations which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies are invalid.

A. Statutory Claim

The Medicaid Program, governed by Title XIX of the Social Security Act, 42 U.S.C. §§1396 et seq., provides a comprehensive scheme of federal financial assistance to enable states electing to participate to furnish medical assistance to indigent persons. The program, administered by the participating states, is jointly funded by federal grants-in-aid and participating states.

A state which elects to participate in the Medical Assistance Program must comply with the requirements of Title XIX of the Social Security Act and with regulations promulgated thereunder. A paramount statutory requirement for participating states is that they provide certain medical services to all recipients. Pennsylvania, for example, must provide to all Medical Assistance recipients the following services: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child-bearing age; and (5) physicians' services furnished by a physician whether in the office, patient's home, hospital or

elsewhere. 42 U.S.C. §1396a(a)(13)(B). While abortion services fall within certain of these five mandatory categories of service, as defined by Title XIX and HEW regulations, Pennsylvania contends that it has broad discretion to determine the type and scope of services which it provides within these five categories of services, including the discretion to exclude from Medical Assistance reimbursement any treatment which it defines as "unnecessary". And according to Pennsylvania, the DPW Abortion Procedures which exclude "non-therapeutic" abortions from Medical Assistance reimbursement is a proper exercise of such discretion.

Assuming that Pennsylvania may exclude "unnecessary" treatment from Medical Assistance reimbursement, however, its determination of what medical treatment is "unnecessary" must be consistent with the requirements, standards and policies of Title XIX. For the reasons expressed by the Court of Appeals for the Third Circuit, Pennsylvania's Abortion Procedures are not justified by any statutory policy and furthermore run directly counter to various requirements, standards and policies of Title XIX. These include the requirement that the medical assistance made available to a recipient shall not be less in amount, duration or scope than the medical assistance available to other recipients (§1396a(a)(10)(B) and (C)); the requirement that the state safeguard "the best interests of the recipients" (§1396a(a)(19); and the Congressional objective that the choice of treatment of a condition be left to the judgment of the attending physician unless a state can show that its interference with physicians' medical decisions promotes policies of Title XIX. See, generally, Opinion of the Court of Appeals for the Third Circuit at 69a-84a.

B. Constitutional Claim

The Pennsylvania Medical Assistance Program provides

medical services to each indigent pregnant woman who carries her pregnancy to birth. On the other hand, the indigent pregnant woman who seeks to terminate her pregnancy by abortion (with limited exceptions) is denied free medical services. Thus Pennsylvania has created two classes of indigent pregnant women: those who continue their pregnancies to birth and those who seek to terminate their pregnancies by abortion.

The decision whether or not to terminate a pregnancy is constitutionally protected from state interference. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739 (1973). Consequently, in the absence of a compelling state interest, Pennsylvania cannot create two classes of needy people indistinguishable from each other except that one is composed of persons who choose to continue their pregnancies to birth and the other of persons who in consultation with their attending physicians choose to exercise their constitutional right to terminate their pregnancies by abortion. See Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076 (1974); Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969).

Clearly Pennsylvania's classification does not promote a compelling state interest. In fact, plaintiffs successfully argued in the District Court that even if the DPW Abortion Procedures were judged by the "rational basis" Equal Protection standards used to determine the constitutionality of a classification which does not infringe upon a fundamental right, the Procedures are unconstitutional. In its Opinion, the District Court reviewed the various justifications which Pennsylvania might offer for denying Medical Assistance reimbursement to indigent women who in consultation with their physicians seek first trimester abortions and found no valid state interest to be promoted by excluding such abortions from Medical Assistance reimbursement:

> We hold that the State's decision to limit coverage to 'medically indicated' abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest. 37a

Pennsylvania argues that a "non-therapeutic" abortion is "unnecessary" because the patient can continue her pergnancy to birth. It is, however, equally valid to characterize the services rendered in connection with childbirth as "unnecessary" because these more risky and more expensive services could have been avoided by an earlier abortion. The fact of the matter is that pregnancy is a physical condition which requires medical services and after Roe and Doe, abortion and childbirth are each proper methods of treating the condition. Thus where the attending physician in consultation with the patient determines in the exercise of his or her medical judgment that an abortion is an appropriate method of treating the patient's pregnancy condition, there is no reasonable basis for characterizing this treatment as unnecessary and therefore outside the coverage of the Medical Assistance Program. It is the condition to be treated, and not the choice of treatment, that determines whether the services are necessary. See fn. 20, Opinion of the Court of Appeals for the Third Circuit.

By providing Medical Assistance reimbursement only to women who continue their pregnancies to childbirth, Pennsylvania requires an indigent pregnant woman to forfeit her constitutional right to terminate her pregnancy in order to receive free medical services. This is constitutionally impermissible. A state may not condition receipt of statutory benefits upon forfeiture of constitutional rights. See Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790 (1963). As the District Court in the present case said in its Opinion:

> ...we hold that the Commonwealth has already determined that the condition of pregnancy brings about the necessity of medical services. The Commonwealth cannot then discriminate with respect to the methods of treatment for that condition, for in the first trimester of pregnancy, Roe v. Wade,

supra, the selection of the method of treatment is the inviolable fundamental right of the physician and the patient.

. . . . .

As agreed by the Dissent, we are not to determine the presence or absence of a compelling State interest in the first trimester of pregnancy—the Supreme Court of the United States has eliminated this problem in declaring the fundamental right of the physician and patient as being paramount to the interest of the State. We do not hold that the State must finance a fundamental right, but we hold that the expression of that fundamental right cannot be the basis for invidious discrimination.
pp. 39a-40a

II.

No Federal Courts have upheld state regulations denying Medical Assistance reimbursement for "non-therapeutic" abortions.

In numerous cases indigent pregnant women who participate in state Medical Assistance programs have questioned the legality of state restrictions on Medical Assistance reimbursement for "non-therapeutic" abortions performed by licensed physicians. In most of these cases the legality of these restrictions has been questioned on both statutory and constitutional grounds.

There is a split of authority as to whether such restrictions violate Title XIX of the Social Security Act, 42 U.S.C. §1396. In the following cases, courts have held that such restrictions are inconsistent with Title XIX: Doe v. Beale, ____ F.2d ____ (3rd Cir., 7/21/75, 60a-120a); Doe v. Westby, ___ F. Supp. _____ (D. South Dakota, September 29, 1975, Docket No. C-74-5017); Doe v. Myatt, ____ F. Supp. ____ (D. North Dakota, 10/30/75, Docket No. A3-74-48); Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972), vacated and remanded in light of Doe v. Bolton and Roe v. Wade, 412 U.S. 924, 93 S. Ct. 2747 (1973); Smith v. Tinder, (S.D. W. Vir., Aug. 8, 1975,

Docket No. 75-0390) (Stipulated Judgment).

A contrary result has been reached by the following courts: Roe v. Ferguson, 515 F.2d 279 (6 Cir. 1975), reversing 389 F. Supp. 387 (S.D. Ohio 1974); Roe v. Norton, ____ F.2d ____ (2nd Cir., 7/31/75, Docket No. 74-1874), reversing 380 F. Supp. 726 (D. Conn. 1974). Also see Doe v. Rose, 499 F.2d 1112, 1114-5 (10 Cir. 1974).

When a court concludes that restrictions on Medical Assistance reimbursement for abortions do not violate Title XIX of the Social Security Act, the court, of course, must consider the constitutional claim. And in cases in which federal courts have reached the constitutional claim, they, without exception, find such restrictions to be invalid on constitutional grounds. See Wulff v. Singleton, 508 F.2d 1211 (8 Cir. 1974), cert. granted on standing and procedural issues at ____ U.S. ____ (1975); Doe v. Rose, supra; Doe v. Westby, 383 F. Supp. 1143 (D. South Dakota, 1974), vacated and remanded in light of Hagans v. Lavine, 415 U.S. 543, 95 S. Ct. 1385 (1975), ____ F. Supp. ____ (D. South Dakota, September 29, 1975, Docket No. C-74-5017); Doe v. Myatt, supra; Doe v. Rampton, 366 F. Supp. 189 (D. Utah, 1973); Klein v. Nassau County Medical Center, supra; Doe v. O'Bannon, ____ F. Supp. ____ (D. Minn., August 1, 1975, No. 4-74-Civ. 69); and Smith v. Tinder, supra.

On the basis of Roe v. Ferguson, supra, and Roe v. Norton, supra, which reverse District Court rulings that Ohio and Connecticut restrictions on Medical Assistance reimbursement for abortions violate Title XIX of the Social Security Act, petitioners contend this Court's intervention is necessary to resolve a conflict amongst the federal courts. In Roe v. Ferguson and Roe v. Norton, however, the Court of Appeals did not uphold the Ohio and Connecticut restrictions but, instead, remanded the cases to the District Courts to consider plaintiffs' constitutional claim.

The issue which concerns the parties is the legality of restrictions on Medical Assistance reimbursement for abortions performed by physicians during the first two trimesters of pregnancy. The relief provided to the parties is the same regardless of whether the restrictions are stricken on statutory or constitutional grounds.

There is no need for intervention by this Court where federal courts reach the same result, but for different reasons, because in this situation the rights and liabilities of the parties, as determined by the federal courts, are uniform.* Thus unless and until a federal court rejects both the constitutional and statutory challenges to state restrictions on Medical Assistance reimbursement for abortions, there is no conflict requiring intervention by this Court.

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* HEW takes the position that a state Medical Assistance program may provide reimbursement for non-therapeutic abortions and that the federal government will share these costs with the states pursuant to Title XIX of the Social Security Act. See Dissenting Opinion of Court of Appeals, 102a-104a; Roe v. Norton, supra, slip op. at 5305-6. Thus the split of opinion within the circuit courts as to whether Title XIX requires federal reimbursement for non-therapeutic abortions does not place a state in the position of jeopardizing its federal funding by following decisions of the federal courts that reimbursement under Title XIX is required.

III.

A reversal of the Court of Appeals' ruling would lead to more appellate review.*

In the federal court cases cited previously, the question of federal law is the legality of restrictions on Medical Assistance reimbursement for abortions. If petitioners' request that this Court reverse the ruling of the Court of Appeals for the Third Circuit were granted, this question of the legality of such restrictions would still be unresolved. The effect of the reversal would be to require the parties to this proceeding to litigate in the Court of Appeals for the Third Circuit the constitutionality of petitioners' Abortion Procedures. And the losing party would undoubtedly request this Court to review any ruling of the Court of Appeals.

Also the uncertainty created by a reversal of the Court of Appeals' ruling would work a serious hardship on indigent pregnant women throughout Pennsylvania. Such women cannot obtain abortions unless hospitals and physicians provide such services without charge. Most hospitals and physicians, however, will not provide such services without charge if their right to reimbursement from Pennsylvania's Medical Assistance Program is uncertain. At the present time, Pennsylvania, in response to the ruling of the Court of Appeals for the Third

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* For purposes of this argument, respondents assume that this Court is being requested to review only whether petitioners' Abortion Regulations are consistent with Title XIX of the Social Security Act. If this Court were to consider both statutory and constitutional claims, obviously the entire issue will be resolved. Respondents suggest, however, that the constitutional claim is premature and also that it should be considered in a case in which the decision being reviewed considered this claim. The constitutional claim is premature because only two circuit courts have considered this claim: Wulff v. Singleton, supra (8 Cir.) and Doe v. Rose, supra (10 Cir.). If the circuit courts continue to agree that restrictions on Medical Assistance reimbursement for abortions are unconstitutional, there would perhaps be no need for this Court to review the constitutional claim. On the other hand, if any courts conclude that such restrictions are constitutional, the issues will be more fully developed for review by this Court.

Circuit, has adopted temporary regulations which guarantee Medical Assistance reimbursement for first and second trimester abortions. These regulations were adopted solely because of the Court of Appeals' ruling that Title XIX of the Social Security Act requires Pennsylvania to provide reimbursement for first and second trimester abortions and will immediately be revoked if this Court were to reverse the ruling of the Court of Appeals. This, in turn, would result in hospitals and physicians ceasing to provide abortions to Medical Assistance recipients until the constitutionality of petitioners' Abortion Procedures was resolved.

Even assuming that the legality of restrictions on Medical Assistance reimbursement is an important question of federal law which should be settled by this Court, this is not the case in which the issue should be settled. Cases will arise in which the appellate court considered both the constitutional and statutory arguments and review of such a case would be far more appropriate to resolve questions concerning the legality of such restrictions.

Conclusion

For the reasons stated herein, respondents request that Pennsylvania's Petition for Writ of Certiorari be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Stanton Wettick, Jr., hereby certify that service of Respondents' Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was made on counsel for petitioners by delivering and/or mailing by first-class postage prepaid a copy of said Brief to Norman J. Watkins, Deputy Attorney General, Department of Justice, Capitol Annex, Harrisburg, Pennsylvania 17120.

I further certify that all parties required to be served have been served.

Dated: November 24, 1975

R. Stanton Wettick, Jr.

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